

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

UNITED MIDWEST SAVINGS BANK,)

Plaintiff, )

v. )

Cause No.: 4:21-cv-01403-AGF

MCGRAW W. MILHAVEN, )

Defendant. )

**MEMORANDUM AND ORDER**

Plaintiff United Midwest Savings Bank has filed a motion for summary judgment with respect to its single claim for breach of contract, arising out of Defendant's alleged failure to pay amounts due and owing in connection with a Small Business Association loan and guarantee. Defendant has asserted affirmative defenses that include fraudulent inducement based on alleged misrepresentations made by Plaintiff's employees during the loan application and closing processes.

The matter is now before on Defendant's motion, pursuant to Federal Rules of Civil Procedure 56(d), to allow Defendant an opportunity to take discovery before responding to the summary judgment motion. Defendant has attached an affidavit of in support of his Rule 56(d) request.

Rule 56(d) provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or

declarations or to take discovery; or (3) issue any other appropriate order.” Fed. R. Civ. P.56(d). Because “[t]he purpose of Rule 56(d) is to provide an additional safeguard against an improvident or premature grant of summary judgment,” courts have held that “the rule should be applied with a spirit of liberality,” particularly where, as here, the case is still in the relatively early stages. *Rummel v. Massachusetts Mut. Life Ins. Co.*, No. 4:13 CV 1743 RWS, 2014 WL 1116741, at \*1 (E.D. Mo. Mar. 20, 2014) (citations omitted).

Plaintiff filed its motion for summary judgment shortly after the case was filed and prior to the deadline for initial disclosures under Rule 26(a)(1) and the commencement of discovery. Defendant asserts that he should be permitted to obtain discovery on the issue of the alleged misrepresentations made by Plaintiff’s employees. In response, Plaintiff asserts that the defense of fraudulent inducement fails as a matter of law, so discovery on the issue is unnecessary.

Upon careful consideration of the parties’ briefs and the authorities cited therein, the Court concludes that Defendant has made at least a good faith showing that discovery may inform his response to Plaintiff’s summary judgment motion. Defendant is entitled to at least a brief period of time to conduct such discovery in order to prepare a response to the motion, even if Plaintiff ultimately convinces the Court that the response lacks merit.

For these reasons, the Court will give Defendant 60 days, or until August 8 2022, to conduct whatever discovery that he believes is necessary to respond to Plaintiff’s summary judgment motion. The Court will also follow the “usual practice” under Rule

56(d), which is to deny Plaintiff's motion for summary judgment without prejudice to reapply after Defendant has conducted this discovery. *See* 10B Charles Alan Wright & Arthur R. Miller, et al., Federal Practice and Procedure § 2740 (4th ed.). After that time, Plaintiff may refile its motion for summary judgment, and may advise the Court that it wishes to incorporate by reference its previously filed statement of facts and memorandum in support thereof, or Plaintiff may file a new such statement and memorandum. The Court will give Defendant 28 days to respond to the motion, once refiled, and the Court will not grant any further request under Rule 56(d) by Defendant absent a showing with specificity that additional discovery is required to respond to the motion, and good cause why such discovery has not been completed.

Accordingly,

**IT IS HEREBY ORDERED** that Defendant's Rule 56(d) motion for discovery is **GRANTED in part**, as set forth above. ECF No. 21. Defendant shall have until **August 8, 2022**, to conduct whatever discovery that he believes is necessary to respond to Plaintiff's summary judgment motion. No further Rule 56(d) request by Defendant will be granted absent a showing with specificity that additional discovery is required to respond to the motion, and good cause why such discovery has not been completed.

**IT IS FURTHER ORDERED** that Plaintiff's motion for summary judgment is **DISMISSED without prejudice** to refile after the limited period for discovery, as set forth above. ECF No. 16.

**IT IS FURTHER ORDERED** that on, or after **August 8, 2022**, Plaintiff may refile its motion for summary judgment, either incorporating by reference its previously

filed statement of facts and memorandum in support thereof or filing a new supporting statement and memorandum. Defendant's response shall be due no later than 28 days after such a motion is filed; any reply shall be due no later than 14 days thereafter.

A handwritten signature in black ink, reading "Audrey G. Fleissig". The signature is written in a cursive style with a large, looping "f" and "g".

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AUDREY G. FLEISSIG  
UNITED STATES DISTRICT JUDGE

Dated this 7th day of June, 2022.